Supreme Court, U.S.
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No. 05-

IN THE

Supreme Court of the United States

JOSE ANTONIO LOPEZ,

Petitioner,

v.

ALBERTO GONZALES, ATTORNEY GENERAL OF THE UNITED STATES,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether an immigrant who is convicted in state court of a drug crime that is a felony under the state's law but that would only be a misdemeanor under federal law has committed an "aggravated felony" for purposes of the immigration laws.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner respectfully petitions for a writ of certiorari to review a judgment of the United States Court of Appeals for the Eighth Circuit. The Eighth Circuit, in accord with the Fifth Circuit and in conflict with the Second, Third, Sixth, and Ninth Circuits, held that a state-law felony that would be punishable only as a misdemeanor under federal law is nonetheless an "aggravated felony" for purposes of immigration law. Certiorari should be granted to resolve the split in the circuits, which undermines the longstanding policy of national uniformity in enforcement of the immigration laws.

OPINIONS BELOW

The opinion of the court of appeals, App., *infra*, 1a, is reported at 417 F.3d 934. The opinion of the Board of Immigration Appeals, App., *infra*, 8a, and the oral decision of the Immigration Judge, App., *infra*, 10a are unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 9, 2005. App., *infra*, 1a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The Immigration and Naturalization Act ("INA"), Section 101(a)(43), defines "aggravated felony," and it provides, in pertinent part:

> The term "aggravated felony" means—
>
> * * *
>
> (B) illicit trafficking in a controlled substance (as defined in section 102 of the Controlled Substances Act), including a drug trafficking crime (as defined in

section 924(c) of title 18, United States Code);

* * *

The term applies to an offense described in this paragraph whether in violation of Federal or State law and applies to such an offense in violation of the law of a foreign country for which the term of imprisonment was completed within the previous 15 years. Notwithstanding any other provision of law (including any effective date), the term applies regardless of whether the conviction was entered before, on, or after the date of enactment of this paragraph.

8 U.S.C. § 1101(a)(43).

Section 924(c) of title 18 provides, in pertinent part:

> For purposes of this subsection, the term "drug trafficking crime" means any felony punishable under the Controlled Substances Act (21 U.S.C. 801 *et seq.*), the Controlled Substances Import and Export Act (21 U.S.C. 951 *et seq.*), or the Maritime Drug Law Enforcement Act (46 U.S.C. App. 1901 *et seq.*).

18 U.S.C. § 924(c)(2).

INA Section 240A provides, in pertinent part:

> Cancellation of removal; adjustment of status
>
> (a) Cancellation of removal for certain permanent residents. The Attorney General may cancel removal in the case of

an alien who is inadmissible or deportable from the United States if the alien—

(1) has been an alien lawfully admitted for permanent residence for not less than 5 years,

(2) has resided in the United States continuously for 7 years after having been admitted in any status, and

(3) has not been convicted of any aggravated felony.

8 U.S.C. § 1229b.

STATEMENT OF THE CASE

This case presents an important and recurring question on which the federal courts of appeals are divided: Whether a noncitizen convicted of a drug crime that is a felony under state law, but that would be punishable only as a misdemeanor under federal law, has committed an "aggravated felony" for the purposes of the immigration law.

1. The INA's Definition Of "Aggravated Felony" And "Drug Trafficking Crime." Under the INA, a noncitizen who has been convicted of a violation of a state, federal, or foreign drug law is deportable, unless the violation was "a single offense involving possession for one's own use of 30 grams or less of marijuana." 8 U.S.C. § 1227(a)(2)(B)(i). A noncitizen who has been convicted of an "aggravated felony" is likewise deportable. 8 U.S.C. § 1227(a)(2)(A)(iii).

Determining what "aggravated felony" means under the INA requires navigating what has been described as "a rather confusing maze of statutory cross-references." *United States* v. *Placios-Suarez*, 418 F.3d 692, 694 (6th Cir. 2005). Section 101 of the INA defines "aggravated felony" as "illicit trafficking in a controlled

substance (as defined in section 102 of the Controlled Substances Act), including a drug trafficking crime (as defined in section 924(c) of title 18, United States Code)." 8 U.S.C. § 1101(a)(43)(b). Section 101 further provides that the term applies to an offense "whether in violation of Federal or State law." *Id.* at § 1101(a)(43). On its face, the section defines two categories of drug convictions that may be considered an aggravated felony: State or federal offenses that involve "illicit trafficking" of a controlled substance and those that fall under the definition of "drug trafficking crime" in Section 924(c) of title 18.

Section 924(c) of title 18, in turn, defines "drug trafficking crime," as "any felony punishable under the Controlled Substances Act (21 U.S.C. 801 *et seq.*)" and two other federal laws not at issue here. This case presents a question upon which the circuits have split: namely, whether "any felony punishable under the Controlled Substances Act" includes a state-law felony that would be punishable only as a misdemeanor under federal law and that does not contain a trafficking element.

2. Consequences Of An "Aggravated Felony" Conviction. A legal resident alien who is deportable because of a drug conviction (or for other reasons) may apply for discretionary cancellation of removal under INA Section 240A if three conditions are met. 8 U.S.C. § 1229b(a). The alien must: (1) have been lawfully admitted for not less than five years; (2) have been a continuous resident for not less than seven years; and (3) not have been convicted of an aggravated felony. *Id.* An alien who is found to have committed an aggravated felony is ineligible to apply for cancellation of removal.

An aggravated felony conviction also has other serious consequences in the deportation context. A noncitizen who commits an aggravated felony is ineligible for asylum or withholding of removal to a country where his life or freedom would be threatened. 8 U.S.C.

§§ 1158(b)(2)(B) (asylum), 1231(b)(3)(B) (withholding of removal). He is foreclosed from demonstrating good moral character and therefore cannot become a naturalized citizen of the United States. 8 U.S.C. §§ 1101(f)(8); 1427(a)(3). He is barred from reentering the United States for twenty years and is subject to a criminal sanction for illegal reentry of up to twenty years in prison. 8 U.S.C. § 1182(a)(9)(A)(i), 1326(b)(2).

3. Factual Background. Petitioner Jose Antonio Lopez has resided in the United States since 1985. App. *infra*, 18a. In 1990, Lopez became a legal permanent resident under the Seasonal Agricultural Worker program. *Id.* at 2a. Lopez's wife is a citizen of Mexico who resides in the United States pursuant to visas granted in 1994 and 2001. *Id.* at 14a. Lopez and his wife have two children, aged six and nine, who are both American citizens. *Id.* at 13a. Lopez is a homeowner and also owns the Lopez Mexican Store, a grocery in Sioux Falls, South Dakota. *Id.* at 13a, 14a.

Lopez has been arrested once in the 20 years he has spent in the United States. *Id.* at 13a. In 1997, Lopez pleaded guilty to aiding and abetting the possession of a controlled substance by another individual. The offense is a felony under South Dakota law but would only be a misdemeanor under federal law. *Id.* at 2a; 21 U.S.C. § 844 (defining penalty for simple possession). The Immigration and Naturalization Service initiated removal proceedings against Lopez in 1998, contending that he was removable for two reasons. First, the INS argued that Lopez's conviction was a controlled substance violation, rendering him removable pursuant to Section 237(a)(2)(B)(i) of the INA, 8 U.S.C. § 1227(a)(2)(B)(i). Second, the INS argued that Lopez's aiding and abetting possession offense rendered him removable as an "aggravated felony" based on drug trafficking under INA § 237(a)(2)(A)(iii), 8 U.S.C. § 1227(a)(2)(A)(iii).

Lopez conceded that the conviction constituted a controlled substance violation and that he was removable for that reason. But he contested whether the conviction was an aggravated felony. In 1998, when the INS instituted removal proceedings, both the Bureau of Immigration Appeals and the Second Circuit had held that a state-law controlled substance felony is not a "drug trafficking crime" and therefore not an "aggravated felony" for deportation purposes if it would not be a felony under federal law. *See Aguirre* v. *INS*, 79 F.3d 315, 317 (2d Cir. 1996); *In re Davis*, 20 I. & N. Dec. 536, 541-42 (B.I.A. 1992).

Lopez was otherwise eligible to apply for cancellation of removal under Section 240A of the INA because he had been lawfully admitted for permanent residence for more than five years and had been a continuous resident for more than seven years. 8 U.S.C. § 1229b(a). Lopez's conviction was not a "drug trafficking crime" or an "aggravated felony" under the then-prevailing precedent, and he applied for cancellation of his removal.

3. The Decision Of The Immigration Judge. The Immigration Judge found Lopez removable on both grounds argued by INS: that he was convicted of a controlled substance offense and that his aiding and abetting drug possession conviction was an aggravated felony based on drug trafficking. App., *infra*, 2a. The latter ruling made Lopez ineligible for cancellation of removal, and the Immigration Judge accordingly denied Lopez's application for cancellation of removal. *Id.*

4. The Eighth Circuit's Decision. The Eighth Circuit affirmed. The court held that "the plain language of the INA, and of the other statutes it refers to, states that any drug conviction that would qualify as a felony under either state or federal law is an aggravated felony." *Id.* at 4a. The court noted that its holding is in

accord with the Fifth Circuit and conflicts with the Second, Third, and Ninth Circuits. *Id.* at 4a-5a.[1]

REASONS FOR GRANTING THE WRIT

I. The Decision Of The Eighth Circuit Conflicts With That Of Four Other Circuits.

The Eighth Circuit's opinion in this case recognizes the split among the circuits on whether a state law felony that would be punishable only as a misdemeanor under federal law may be an "aggravated felony" for purposes of the immigration laws. App., *infra*, 4a-5a. Other courts have also noted this split. *E.g.*, *United States* v. *Palacios-Suarez*, 418 F.3d 692 (6th Cir. 2005); ("Courts have adopted two competing interpretations of the phrase 'any felony punishable under' the enumerated statutes in § 924(c)(2)."); *Liao* v. *Rabbet*, 398 F.3d 389, 390-93 (6th Cir. 2005) ("Competing interpretations of the phrase 'any felony punishable under the Controlled Substances Act [CSA]' . . . have developed."); *Cazarez-Gutierrez* v. *Ashcroft*, 382 F.3d 905, 910 (9th Cir. 2004).[2]

The split is even more pronounced than would appear from the Eighth Circuit's decision: The Sixth

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[1] Before turning to the merits, the Eighth Circuit determined that it had jurisdiction to review the petition under INA § 242 as amended. App., *infra*, 2a-3a; 8 U.S.C. § 1252(a)(2)(D). A recent amendment to that section provided an exception for questions of law from the prohibition of review of rulings denying discretionary relief under INA § 240A. *Id.*

[2] The Court regularly grants certiorari to resolve circuit conflicts over the meaning of the immigration laws. *E.g.*, *Fernandez-Vargas* v. *Gonzales* (No. 04-1376, cert. granted Oct. 31, 2005); *Clark* v. *Martinez*, 125 S. Ct. 716, 722 (2005); *Leocal* v. *Ashcroft*, 543 U.S. 1 (2004); *Demore* v. *Kim*, 538 U.S. 510, 516 (2003).

Circuit recently joined the majority of circuits that have considered the issue by holding that a state-law drug conviction is only an "aggravated felony" for deportation purposes if it would be punishable as a felony under the Controlled Substances Act. *Placios-Suarez*, 418 F.3d at 694. On the other hand, one circuit agrees with the Eighth, that a state-law crime may be an aggravated felony for immigration purposes even if it would be punishable only as a misdemeanor under federal law.[3] *United States* v. *Hernandez-Avalos*, 251 F.3d 505, 508 (5th Cir. 2001).

The circuit split described in the Eighth Circuit's opinion warrants review by this Court. The conflict among the circuits creates disparate treatment of aliens depending upon where they reside. Some aliens convicted of simple drug possession are eligible for asylum, naturalization, and cancellation of removal, while others are considered "aggravated felons," ineligible for any of these benefits. This schism violates the fundamental principle that immigration laws should be applied uniformly across the country. Review is warranted because the decision below has exacerbated the circuit split, the Eighth Circuit joining the minority position among the circuits. Failure to review the Eighth Circuit's decision will perpetuate the incongruous treatment of aliens based on geographic happenstance.

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[3] The Bureau of Immigration Appeals has reversed its prior position, and now applies the Fifth and Eighth Circuits' rule in those Circuits that have not decided to the contrary. *See In re Yanez-Garcia*, 23 I. & N. Dec. 390 (B.I.A. 2002) (reversing former decision that state law felony must be a federal felony to be an "aggravated felony" under the INA).

A. The Second, Third, Sixth, and Ninth Circuits Hold That A Felony Under State Law That Is Only A Misdemeanor Under Federal Law And Does Not Contain A Trafficking Element Is Not A "Drug Trafficking Crime" And Therefore Not An "Aggravated Felony" For Immigration Purposes.

Four circuits have held that a state-law conviction for a drug offense that is punishable only as a misdemeanor under federal law is not a "drug trafficking crime" and hence not an "aggravated felony" under the immigration laws.

Most recently, the Sixth Circuit faced "the unresolved question of determining which interpretation of an 'aggravated felony' should be used in [the Sixth] circuit." *Palacios-Suarez*, 418 F.3d at 697. The court ultimately concluded that a state law drug felony that is punishable only as a misdemeanor under federal law is not a "drug trafficking crime" and therefore not an "aggravated felony." *Id.* at 699-700.

In arriving at this conclusion, the court traced the case law from the first decision of the Board of Immigration Appeals in 1992, which held that a state drug conviction could qualify as an aggravated felony "if the state felony conviction had a trafficking element" or "if the conviction would be punishable as a felony under one of the enumerated federal drug statutes" in Section 924(c)(2) of title 18. *Id.* at 695 (citing *In re Davis*, 20 I. & N. Dec. 536, 541-42 (B.I.A. 1992)) (marks omitted). The court noted that the Second, Third, and Ninth Circuits have expressly adopted the B.I.A.'s holding in *In re Davis*. *Id.* at 695-96. The court then examined those cases that have taken the contrary view, that a state drug conviction is a drug trafficking crime and thus an aggravated felony if "the conviction is a felony under *either state or federal law*" and "the conduct underlying

the conviction is punishable under the CSA (or the other two statutes not at issue here)." *Id.* at 696.[4]

The court rejected the view that the plain language of Section 924(c)(2) requires this broader interpretation of "drug trafficking crime." *Id.* at 697. Instead, the court found that either approach "could be supported by the plain meaning of the statute." *Id.* at 698. The court then looked to the legislative history of Section 924(c)(2). *Id.* at 698-99. The court noted that before 1998, the section "was limited *to only federal felony offenses*," and that the subsequent amendment to the section was titled a "*clarification* of definition of drug trafficking crimes." *Id.* (quoting Pub. L. No. 100-690 § 6212, 102 Stat. 4181, 4360 (1988)) (emphases supplied). The court therefore found that the "original understanding of the term as limited to federal felonies was unchanged." *Id.* at 699. The court concluded that "Congress did not intend for state felony convictions (not involving any element of drug trafficking) to qualify as an 'aggravated felony' under [INA] § 1101(a)(43)(B) if the offense would be punishable only as a federal misdemeanor under the CSA." *Id.* at 699-700.

The Ninth Circuit conducted a similar examination of the circuit split in *Cazarez-Gutierrez* v. *Ashcroft.* 382 F.3d 905, 910 (9th Cir. 2004). Like the Sixth Circuit, the Ninth analyzed the holdings of the Second, Third, and Fifth Circuits, and "ultimately [came]

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[4] *Placios-Suarez* was decided before the Eighth Circuit's decision in this case. At that time, the Fifth Circuit was the only circuit to have interpreted "aggravated felony" in the immigration context to include state law felonies that would be punishable only as a misdemeanors under federal law. Other courts, however, had adopted this view for purposes of the federal Sentencing Guidelines. *Placios-Suarez*, 418 F.3d at 696 (collecting cases).

down on the side of the Second and Third Circuits." *Id.* The court looked to "[t]he presumption that immigration laws should be interpreted to be nationally uniform, evidence that Congress intended uniformity, and prudential concerns" to come to the conclusion that "a state drug offense is an aggravated felony for immigration purposes only if it would be punishable as a felony under federal drug laws or the crime contains a trafficking element." *Id.* at 912.

The Ninth Circuit cited as a basis for its decision "the strong interest in national uniformity in the administration of immigration laws." *Id.* at 912. The court noted that "'the policy favoring uniformity in the immigration context is rooted in the Constitution,'" and quoted Alexander Hamilton writing in The Federalist that "immigration was one of the few powers 'EXCLUSIVELY delegated to the United States.'" *Id.* (quoting *Gerbier* v. *Holmes*, 280 F.3d 297, 311 (3d Cir. 2002), and The Federalist No. 32). The court found that the need for uniformity in the immigration laws is "paramount," and that the Fifth Circuit's definition of "drug trafficking crime" "necessarily incorporates vagaries in state law that create widely divergent immigration consequences for aliens convicted of minor drug offenses in different states." *Id.* at 914.

The court therefore concluded that "a state drug offense is not an aggravated felony for immigration purposes unless it is punishable as a felony under the CSA or other federal drug laws named in the definition of 'drug trafficking crime,' or is a crime involving a trafficking element." *Id.* at 919.

The Ninth Circuit's opinion agreed with the opinions of the Third and Second Circuits before it. In *Gerbier* v. *Holmes*, the Third Circuit held that "a state drug conviction, for deportation purposes, constitutes an 'aggravated felony' if it is either a felony under state law and contains a trafficking element, or would be

punishable as a felony under the federal Controlled Substances Act." 280 F.3d at 312. The court based its decision on "precepts of statutory construction and [] the legislative history of § 924(c)(2)." *Id.* at 299. Further, the court stated that "this conclusion properly reflects the policy favoring uniformity in construction of the INA because it subjects aliens to the same treatment regardless of how different states might categorize similar drug crimes." *Id.*

And the Second Circuit, in *Aguirre* v. *INS*, overruled its prior precedent that "an offense that is a felony under either Federal or state law qualifies as an aggravated felony for purposes of discretionary relief under the [INA]." 79 F.3d 315, 317 (2d Cir. 1996) (overruling *Jenkins* v. *INS*, 32 F.3d 11 (2d Cir. 1994)). The court cited its "frequently expressed concern to avoid disparate treatment of similarly situated aliens under the immigration laws," and "the interests of nationwide uniformity" as considerations that outweighed adherence to Circuit precedent. *Id.*

Four circuits thus hold that a state-law drug felony is not a "drug trafficking crime" under Section 924(c)(2) of Title 18, and therefore not an "aggravated felony" for immigration purposes if it is punishable only as a misdemeanor under federal law. If Petitioner were a resident of any of the states within the Second, Third, Sixth, or Ninth Circuits, his application for cancellation of removal would have been heard before an Immigration Judge. Instead, Petitioner's claim was dismissed based solely on the determination that he had been convicted of an aggravated felony. App., *infra*, 4a.

B. The Fifth and Eighth Circuits Hold That Any State-Law Drug Felony Is A Drug Trafficking Crime And Thus An Aggravated Felony.

Two circuits have taken the contrary position that any state-law drug felony is a drug trafficking crime and therefore an aggravated felony for purposes of the immigration laws. The Eighth Circuit's opinion in this case concluded that "the plain language of the INA, and the other statutes it refers to, states that any drug conviction that would qualify as a felony under either state or federal law is an aggravated felony." App., *infra*, 4a.

The Fifth Circuit has also held that "section 924(c) [means] that a state drug conviction is a 'drug trafficking crime' (and thus an aggravated felony) if '(1) the offense was punishable under the Controlled Substances Act and (2) it was a felony' under either state or federal law." *United States* v. *Hernandez-Avalos*, 251 F.3d 505, 508 (5th Cir. 2001) (quoting *United States* v. *Hinojosa-Lopez*, 130 F.3d 691, 694 (5th Cir. 1997)). The court also based its opinion on what it considered to be the "plain language of the statutes." *Id.* at 510.

The Fifth Circuit in *Hernandez-Avalos* and the Eighth Circuit's decision in this case thus directly conflict with the Second, Third, Sixth, and Ninth Circuits on the Question Presented. This split in authority among the circuits alone is reason to grant the writ. Repairing the uniformity of the federal law is of even greater importance in this instance, however, because of the oft-stated interest in uniform application of the immigration laws.[5]

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[5] Several other circuits have interpreted the language at issue in the separate context of the Sentencing Guidelines. Those (...continued)

II. A State-Law Drug Conviction Is Properly Considered A Drug Trafficking Crime And Therefore An Aggravated Felony If It Contains A Trafficking Element Or Is A Felony Under Federal Law.

The lower court decisions holding that a drug possession offense that is a state-law felony but only punishable as a misdemeanor under federal law is nevertheless a "drug trafficking crime" and therefore an "aggravated felony" under the INA are unpersuasive. These decisions conclude that the language of Section 924(c)(2) of title 18 is "plain" and that Congress therefore intended that noncitizens be subject to different consequences under the immigration laws based on variations in how states punish drug offenses. App., *infra*, 4a; *Hernandez-Avalos*, 251 F.3d at 510. Contrary to these courts' decisions, a careful reading of the statutes shows that a state-law felony that would only be a misdemeanor under the federal law is not a "felony" under Section 924(c)(2) of title 18 and therefore not a "drug trafficking crime" or an "aggravated felony" under the INA. Moreover, these cases do not reconcile their holdings with the longstanding policy of ensuring uniform application of the immigration laws.

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courts have held that a state-law drug conviction may be an "aggravated felony" based on drug trafficking even if the conduct would only constitute a misdemeanor under federal law. *See United States* v. *Wilson*, 316 F.3d 506, 512-13 (4th Cir. 2003); *United States* v. *Simon*, 168 F.3d 1271, 1271 (11th Cir. 1999); *United States* v. *Cabrera-Sosa*, 81 F.3d 998, 999-1000 (10th Cir. 1996); *United States* v. *Restrepo-Aguilar*, 74 F.3d 361, 363-66 (1st Cir. 1996). Although it is unknown whether these circuits would adopt the same view in the immigration context, these cases further reflect the deep and entrenched nature of the split in this case.

A. Section 924(c)(2) Does Not Include State Law Felonies Punishable Only As A Misdemeanor In "Any Felony."

The Eighth Circuit's opinion in this case relied on its prior decision in *United States* v. *Briones-Mata*, 116 F.3d 308 (8th Cir. 1997). The analysis in that case is typical of the courts that have found a state law felony drug possession conviction to be an "aggravated felony" under the INA's definition. *See, e.g., United States* v. *Hinojosa-Lopez*, 130 F.3d 691, 694 (5th Cir. 1997) (relying, *inter alia*, on *Briones-Mata*). The Eighth Circuit in *Briones-Mata* concluded that because Section 924(c)(2) defines "drug trafficking crime" as "any felony punishable under the Controlled Substances Act," it should therefore look to the definition of "felony" in the Controlled Substances Act. *Id.* at 309. "Felony" is defined in the Controlled Substances Act as "any Federal or State offense classified by applicable Federal or State Law as a felony." 21 U.S.C. § 802(13).

But Section 924(c)(2) of title 18 defines "drug trafficking crime" as "any felony *punishable under* the Controlled Substances Act." 18 U.S.C. § 924(c)(2) (emphasis added). The provision does not refer to any felony *as defined under* the Controlled Substances Act. As the many cross-references in this statutory scheme attest, Congress knew well how to incorporate a definition from another statute if that is what it wanted to do. Congress did not incorporate the definition of "felony" from the Controlled Substances Act, and the definition of "felony" contained therein is thus inapposite.

Rather, Section 101(a)(43) of the INA refers to title 18 of the United States Code, which is the general federal criminal statute, for its definition of "drug trafficking crime." The more natural reading is that "any felony" as used in Section 924(c)(2) of that title means a felony as otherwise defined in title 18.

Section 3559(a) of title 18 sets forth the framework by which federal crimes are classified as felonies or misdemeanors, and provides that an offense whose maximum term of imprisonment is more than six months but less than one year is a Class A misdemeanor. 18 U.S.C. § 3559(a). Offenses whose maximum term of imprisonment is more than a year fall into several classes of felony. *Id.* To be a "felony" under title 18, therefore, an offense must be punishable under federal law by a maximum term of imprisonment of a year or more.

Simple possession of a controlled substance under the Controlled Substances Act has a maximum penalty of one year in prison, and is thus a Class A misdemeanor under Title 18. 21 U.S.C. § 844. Simple possession is therefore not a "felony" under title 18, and does not fall within 18 U.S.C. § 924(c)(2)'s "any felony" language.

The history of Section 924(c)(2) bears out this interpretation. Before 1988, the provision defined "drug trafficking crime" as "any felony violation of Federal law involving the distribution, manufacture, or importation of any controlled substance." 18 U.S.C. § 924(c)(2) (1982 & Supp. 1986). The pre-1988 version explicitly limited its scope to "felony violation[s] of Federal law," thus excluding state-law offenses. In 1988, Congress amended the section, labeling the amendment as a "clarification." *See* Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 6212, 102 Stat 4181, 4360 (titled "Clarification of Definition of Drug Trafficking Crimes in which Use or Carrying of Firearms and Armor Piercing Ammunition is Prohibited").

The amendment replaced language describing the kinds of "violation[s] of Federal law" that constituted drug trafficking with a listing of three federal laws that each proscribe conduct that is constitutes a felony under title 18. The amendment thus clarified that the "felony violation[s] of Federal law" Congress intended to constitute a "drug trafficking crime" were those felonies

"punishable under the Controlled Substances Act (21 U.S.C. 801 *et seq.*), the Controlled Substances Import and Export Act (21 U.S.C. 951 *et seq.*), or the Maritime Drug Law Enforcement Act (46 U.S.C. App. 1901 *et seq.*)." 18 U.S.C. § 924(c)(2).

The circuits that hold otherwise erroneously rewrite Section 924(c)(2)'s reference to "any felony punishable under" the Controlled Substances Act to read any felony "as defined under" that Act.

B. Variations In State Law Should Not Undermine The Uniform Enforcement Of The Immigration Laws.

The decisions of the Eighth and Fifth Circuits do not seriously attempt to reconcile their holdings with the longstanding policy of ensuring uniform application of the immigration laws. That policy counsels that similarly-situated noncitizens who have been convicted of drug possession offenses should be subject to the same rules for asylum, naturalization, and cancellation of removal. The decision below causes severely disparate results to similarly-situated aliens depending on how the state where they live defines or chooses to punish minor drug possession offenses.

Congress expressly recognized the policy of uniformity in the immigration laws when it enacted the Immigration Reform and Control Act of 1986, stating, "It is the sense of the Congress that . . . the immigration laws of the United States should be enforced vigorously and uniformly." Pub. L. No. 99-603 § 115, 100 Stat. 3359, 3385 (1986). The courts of appeals have often recognized the importance of uniform enforcement of the immigration laws. For instance, the Eleventh Circuit has stated: "The laws that we administer and the cases we adjudicate often affect individuals in the most fundamental ways. We think that all would agree that to the greatest extent possible our immigration laws should

be applied in a uniform manner nationwide . . . ." *Jaramillo* v. *INS*, 1 F.3d 1149, 1166 (11th Cir. 1993); *see also, e.g.*, *Cazarez-Gutierrez*, 382 F.3d at 912; *Gerbier*, 280 F.3d at 299; *Aguirre*, 79 F.3d at 317; *Rosendo-Ramirez* v. *INS*, 32 F.3d 1085, 1091 (7th Cir. 1994) ("National uniformity in the immigration and naturalization laws is paramount: rarely is the vision of a unitary nation so pronounced as in the laws that determine who may cross our national borders and who may become a citizen.").

III. The Question Presented Will Not Benefit From Further Consideration In The Courts Of Appeals

To date, six circuits have opined on whether a state-law felony that would be punishable as a misdemeanor under federal law is a "drug trafficking crime" under Section 924(c)(2) of title 18 for purposes of the immigration laws. An additional four circuits have considered this question in the context of the Sentencing Guidelines. *See supra*, n.5. The Board of Immigration Appeals has considered facets of this question in several opinions spanning ten years, initially adopting what eventually became the majority approach in furtherance of uniformity in the immigration laws, and later opting instead to follow the law of the various courts of appeals as they continued to reach different conclusions. *See In re Yanez-Garcia*, 23 I. & N. Dec. 390 (B.I.A. 2002) (recognizing that "uniformity is presently unattainable"); *In re K-V-D*, 22 I. & N. Dec. 1163 (B.I.A. 1999); *In re L--- G---*, 21 I. & N. Dec. 89 (B.I.A. 1995); *In re Davis*, 20 I. & N. Dec. 536 (B.I.A. 1992).

The many decisions of the courts of appeals and the Bureau of Immigration Appeals have examined the text of the statutes in question, their legislative history, and policy considerations favoring uniformity in enforcing the immigration laws. Further decisions are thus unlikely to yield any new analysis. The circuits have

staked out their positions and framed the issue for this Court's resolution.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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October 31, 2005

APPENDIX

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 04-2397

Jose Antonio Lopez, *Petitioner*,

v.

Alberto Gonzales,[1] Attorney General of the United States, *Respondent*.

Appeal from the Board of Immigration Appeals

June 24, 2005, Submitted
August 9, 2005, Filed

Before MELLOY, HEANEY, and GRUENDER, Circuit Judges.

GRUENDER, Circuit Judge:

Jose Antonio Lopez appeals an order of the Board of Immigration Appeals ("BIA") pretermitting and denying his application for cancellation of removal. Lopez argues that his state-law conviction for aiding and abetting the possession of a controlled substance is not an aggravated felony for purposes of the Immigration and Naturalization Act ("INA"). For the reasons discussed below, we affirm.

I. BACKGROUND

Petitioner Jose Antonio Lopez entered the United States in 1986 and adjusted his status to legal permanent

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[1] Pursuant to Federal Rule of Appellate Procedure 43(c)(2), Alberto Gonzales is substituted automatically for his predecessor, John Ashcroft, as respondent.

residency as a Seasonal Agricultural Worker in 1990. In September 1997, Lopez was convicted of aiding and abetting the possession of a controlled substance (cocaine) in South Dakota. The conviction was a felony under South Dakota law.

The Immigration and Naturalization Service ("INS") initiated removal proceedings against Lopez in 1998. The INS argued that his drug conviction established two separate grounds for removal: it was both a controlled substance violation under INA § 237(a)(2)(B)(i) and an aggravated felony conviction based on drug trafficking under INA § 237(a)(2)(A)(iii). The INS later added charges that Lopez fraudulently obtained his original adjustment of status in 1990. Lopez conceded removability for the controlled substance violation but filed an application for cancellation of removal as a long-time permanent resident pursuant to INA § 240A(a).

In November 2002, the Immigration Judge (IJ) found Lopez removable on both the controlled-substance-violation and aggravated-felony grounds. The IJ also pretermitted and denied Lopez's application for cancellation of removal because INA § 240A(a), 8 U.S.C. § 1229b(a), forbids the Attorney General to cancel removal for an alien convicted of an aggravated felony. The BIA affirmed the IJ's order with a short opinion. Lopez timely appeals the pretermission and denial of his application for cancellation of removal, arguing that his South Dakota conviction was not an aggravated felony for purposes of the INA.

II. DISCUSSION

We first address our jurisdiction to hear Lopez's appeal. Lopez's eligibility for cancellation of removal is governed by INA § 240A. The INA states that "no court shall have jurisdiction to review . . . any judgment regarding the granting of relief under section . . . 240A." INA § 242(a)(2)(B), 8 U.S.C. § 1252(a)(2)(B). However, the

REAL ID Act of 2005, Pub. L. No. 109-13, 119 Stat. 231, has added an additional jurisdictional provision to INA § 242. The new provision, INA § 242(a)(2)(D), codifies our jurisdiction to review constitutional claims or questions of law raised in petitions for review of decisions made by the Attorney General under INA § 240A and other sections. *See Fernandez-Ruiz* v. *Gonzales*, 410 F.3d 585, 587 (9th Cir. 2005). Furthermore, the amendment was intended to be retroactive, applying to direct review of orders issued before, on or after the date of the enactment. REAL ID Act § 106(b); *Fernandez-Ruiz*, 410 F.3d at 587. In this case, Lopez raises a question of law as to whether his conviction in South Dakota state court meets the INA definition of aggravated felony. As amended, INA § 242 makes clear that we have jurisdiction to review this claim.

"We review the BIA's legal determinations de novo, 'according substantial deference to the [BIA's] interpretation of the statutes and regulations it administers.'" *Regalado-Garcia* v. *INS*, 305 F.3d 784, 787 (8th Cir. 2002) (quoting *Tang* v. *INS*, 223 F.3d 713, 718-19 (8th Cir. 2000)). We review the BIA's interpretation of federal criminal statutes de novo without according any deference. *Omar* v. *INS*, 298 F.3d 710, 714 (8th Cir. 2002), overruled in part on other grounds, *Leocal* v. *Ashcroft*, 160 L. Ed. 2d 271, 125 S. Ct. 377, 380 (2004).

The requirements for eligibility for cancellation of removal for permanent residents are as follows:

> The Attorney General may cancel removal in the case of an alien who is inadmissible or deportable from the United States if the alien—
>
> (1) has been an alien lawfully admitted for permanent residence for not less than 5 years,

> (2) has resided in the United States continuously for 7 years after having been admitted in any status, and
>
> (3) has not been convicted of any aggravated felony.

INA § 240A(a), 8 U.S.C. § 1229b(a).

Lopez argues that his South Dakota conviction for possession of a controlled substance was not an aggravated felony for the purposes of the INA because, although it was a felony under South Dakota law, it would not have qualified as a felony under federal law. However, the plain language of the INA, and of the other statutes it refers to, states that any drug conviction that would qualify as a felony under either state or federal law is an aggravated felony. An aggravated felony is defined as "illicit trafficking in a controlled substance . . ., including a drug trafficking crime (as defined in section 924(c) of title 18, United States Code)." INA § 101(a)(43)(B), 8 U.S.C. § 1101(a)(43)(B). In turn, a drug trafficking crime is "any felony punishable under the Controlled Substances Act (21 U.S.C. § 801 *et seq.*)." 18 U.S.C. 924(c)(2). Finally, "the term 'felony' is defined for the purposes of the Controlled Substances Act (CSA) as 'any Federal or State offense classified by applicable Federal or State Law as a felony.'" *United States* v. *Briones-Mata*, 116 F.3d 308, 309 (8th Cir. 1997) (quoting 21 U.S.C. § 802(13)).

In other words, for INA purposes, a drug trafficking crime is an offense which would be punishable under 21 U.S.C. §§ 801 *et seq.*, and which would qualify as a felony under either state or federal law. *Briones-Mata*, 116 F.3d at 310 ("The definitions of the terms at issue indicate that Congress made a deliberate policy decision to include as an 'aggravated felony' a drug crime that is a felony under state law but only a misdemeanor under the CSA."); *accord United States* v. *Hernandez-Avalos*, 251 F.3d 505,

510 (5th Cir. 2001); *but see Cazarez-Gutierrez* v. *Ashcroft*, 382 F.3d 905, 910-11 (9th Cir. 2004) (relying on "the presumption that immigration laws should be interpreted to be nationally uniform, evidence that Congress intended uniformity, and prudential concerns" in agreeing with the Second and Third Circuits that "state felony drug offenses are not aggravated felonies for immigration purposes unless the offense contains a trafficking element or is punishable as a felony under the federal laws enumerated in 18 U.S.C. § 924(c)(2)").

Lopez's South Dakota conviction for aiding and abetting the possession of a controlled substance was a felony under state law, even though it only would have qualified as a misdemeanor under federal law. Accordingly, following *Briones-Mata*, we hold that Lopez's state-law drug conviction is an aggravated felony for INA purposes.

Lopez contends that the BIA's reliance on Eighth Circuit precedent in finding that his conviction constituted an aggravated felony was an impermissible retroactive application of a new rule. At the time Lopez was convicted in South Dakota, it was the BIA's position that only crimes which would have qualified as felonies under federal law could support a finding of an aggravated felony. *See In re L-G*, 21 I. & N. Dec. 89 (BIA 1995). Later, in *In re Yanez*, the BIA reversed its earlier position, ruling that:

> In those circuits that have spoken, the determination whether a state drug conviction constitutes a 'drug trafficking crime' under § 924(c)(2), and therefore an aggravated felony under section 101(a)(43)(B) of the Act, shall be made by reference to applicable circuit law, and not by reference to any legal standard articulated by this Board.

23 I. & N. Dec. 390, 397 (BIA 2002). In finding that Lopez's South Dakota conviction was an aggravated felony, the IJ cited the *Yanez* rule and accordingly applied our precedent from *Briones-Mata*. The BIA expressly affirmed the IJ's reasoning.

Lopez cites *INS* v. *St. Cyr*, 533 U.S. 289, 150 L. Ed. 2d 347, 121 S. Ct. 2271 (2001), for the proposition that the BIA's "retroactive" application of the *Yanez* rule violated his due process rights. In that case, St. Cyr pleaded guilty to an aggravated felony conviction in March 1996. At the time of his plea, an aggravated felony would not have prevented St. Cyr from obtaining a waiver of deportation (analogous to "cancellation of removal") under INA § 212(c); by the time of his deportation hearing in April 1997, however, § 212(c) had been repealed and replaced with § 240A, under which the aggravated felony barred him from cancellation of removal. The Supreme Court, citing traditional presumptions against the retroactive application of amended statutes, held that aliens who had pleaded guilty to an aggravated felony before the replacement of § 212(c) with § 240A were still eligible to seek cancellation of removal.

In contrast to *St. Cyr*, Lopez pleaded guilty to an aggravated felony in September 1997, months after § 212(c) had been repealed and replaced with § 240A. To avoid the consequences of his aggravated felony, Lopez argues detrimental reliance not on a repealed section of the INA that was in effect at the time of his plea, but rather on the BIA's interpretation of a federal criminal statute at the time of his plea--an interpretation that had no legal force in the Eighth Circuit. *See Hernandez-Avalos*, 251 F.3d at 508 n.3 ("If a circuit court's interpretation of 'aggravated felony' is different from the BIA's interpretation, the INS is bound by the decisions of the circuit court in removal proceedings arising in that circuit."); *Yanez*, 23 I. & N. Dec. 390, 394-96. *Briones-Mata* was published several months before Lopez's guilty

plea in South Dakota and was settled law for removal proceedings arising in the Eighth Circuit regardless of the BIA's conflicting policy at the time of Lopez's plea. *See, e.g.*, *Amaral* v. *INS*, 977 F.2d 33, 36 n.3 (1st Cir. 1992) (noting that a state-law felony conviction was an "aggravated felony" for INA purposes, despite the BIA's failure to rely on that ground). Therefore, the BIA did not retroactively apply a rule in concluding that Lopez's conviction was an aggravated felony for the purposes of the INA under Eighth Circuit precedent.

III. CONCLUSION

We affirm the BIA's order pretermitting and denying Lopez's application for cancellation of removal.

U.S. Department of Justice
Executive Office for Immigration Review

Decision of the Board of Immigration Appeals

File: A91 726 777 - Bloomington Date May 11, 2003

In re: JOSE ANTONIO LOPEZ

IN REMOVAL PROCEEDINGS

APPEAL

CHARGE:

Notice: Sec. 237(a)(2)(A)(iii), I&N Act [8 U.S.C. § 1227(a)(2)(A)(iii)] - Convicted of aggravated felony

Sec. 237(a)(2)(B)(i), I&N Act [8 U.S.C. § 1227(a)(2)(B)(i)] - Convicted of controlled substance violation

Lodged: Sec. 237(a)(1)(A), I&N Act [8 U.S.C. § 1227(a)(l)(A)] - Inadmissible at time of entry or adjustment of status under section 212(a)(6)(C)(i) of the Act, 8 U.S.C. § 1182(a)(6)(C)(i) - Fraud or willful misrepresentation of a material fact

Sec. 237(a)(1)(B), I&N Act [8 U.S.C. § 1227(a)(1)(B)] - In the United States in violation of law

APPLICATION: Cancellation of removal

The respondent appeals from the Immigration Judge's November 22, 2002, decision finding him removable on the two charges listed on the Notice to Appear, pretermitting his application for cancellation of removal under section 240A(a) of the Act, 8 U.S.C. § 1229b(a), and ordering him removed to Mexico. The Department of Homeland Security (the "DHS," formerly

the Immigration and Naturalization Service) did not appeal the Immigration Judge's finding that the respondent was not removable on the lodged charges. The respondent's appeal will be dismissed.

We find no error in the Immigration Judge's determination that the respondent has been convicted of an offense falling within the definition of aggravated felony contained in section 101(a)(43)(B) of the Act, 8 U.S.C. § 1101(a)(43)(B). The Immigration Judge correctly relied on *United States* v. *Briones-Mata*, 116 F.3d 308 (8th Cir. 1997), in finding that under applicable precedent in the United States Court of Appeals for the Eighth Circuit, within whose jurisdiction this matter arises, the respondent was convicted of an aggravated felony. *See Matter of Yanez*, 23 I&N Dec. 390 (BIA 2002). The Immigration Judge also correctly found that the respondent's conviction bars him from the requested relief of cancellation of removal. *See* section 240A(a)(3) of the Act. Finally, we agree with the Immigration Judge that the application of *United States* v. *Briones-Mata*, *supra* and *Matter of Yanez*, *supra*, in this case is not impermissibly retroactive. Consequently, we adopt and affirm the Immigration Judge's decision for the reasons stated therein.

Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.

/s/

FOR THE BOARD

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW

IMMIGRATION COURT

Bloomington, Minnesota

File A 91 726 777 November 22, 2002

In the Matter of

JOSE ANTONIO LOPEZ,) IN REMOVAL
) PROCEEDINGS
Respondent)

CHARGES: 1. Section 237 (a) (2) (B) (i) of the Immigration and Nationality Act, as an alien who at any time after admission has been convicted of a violation of or a conspiracy or attempt to violate any law or regulation of a State, the United States, or a foreign country relating to a controlled substance as defined in 102 of the Controlled Substance Act, 21 U.S.C. 802, other than a single offense involving possession for one's own use or 30 grams or less marijuana.

2. Section 237(a)(2)(A)(iii) of the Immigration and Nationality Act, as a alien who at any time after admission has been convicted of an aggravated felony as defined in Section 101(a)(43) of the Act.

LODGED CHARGES: 1. Section 237(a)(1)(A) of the Immigration and Nationality Act, as an alien who at time of entry or

adjustment of status was within one or more of the classes of aliens inadmissible by the law existing at such time, to wit: aliens who seek to procure, or have sought to procure, or who have procured a visa, other documentation, or admission into the United States, or other benefit provided under the Act, by fraud or by willfully misrepresenting a material fact under Section 212 (a) (6) (C) (i) of the Act.

2. Section 237 (a) (1) (B) of the Immigration Act, as an alien who is present in the United States in violation of law.

APPLICATIONS: 1. Section 240A(a) of the Immigration and Nationality Act, cancellation of removal for certain permanent residents.

ORAL DECISION OF THE IMMIGRATION JUDGE

1. INTRODUCTION AND PROCEDURAL SUMMARY

The respondent is a 33-year-old married male, who is a native and citizen of Mexico. There's a dispute as to when he entered the United States. The Immigration Service charges that he initially entered the United States in May of 1986, as noted in Exhibit 14, allegation 9. Allegation 3 in the Notice to Appear states that he entered on October of 1986. Simply put, the respondent's testimony is that he entered at the end of 1985.

Subsequent to entering the United States, the respondent obtained status as a permanent resident under Section 210 of the Immigration and Nationality Act, the Special Agricultural Worker provisions.

Respondent was placed in removal proceedings on April 17th, 1998, when the Immigration Service filed a Notice to Appear, which is marked as Exhibit 1. In that document, he was charged with removability based on conviction of a controlled substance violation, and also as an alien convicted of an aggravated felony. Based on testimony of the respondent at a prior hearing in this case, the Service issued Forms I-261, the most recent of which is Exhibit 14. That charged that respondent was not in the United States before May, 1986, and, to make a long story short, would not have qualified for the status as a Special Agricultural Worker.

Pleadings have been taken at various times in this case. Suffice it to say that the respondent has conceded that he is removable on the controlled substance charge. The respondent has denied the remaining charges. The Court will discuss the grounds of removability in the analysis section. Suffice it to say that the Court will sustain at both charges in the Notice to Appear and deny both charges in Exhibit 14.

Regarding relief from removal, the respondent is seeking to pursue an application for cancellation of removal for a permanent resident. That application is in Exhibit 7. The respondent testified to support his statutory eligibility to pursue the application. Both sides offered additional documents.

2. THE EVIDENCE PRESENTED

The respondent initially testified in this case in February of 2002. At that time he stated that he had been living at his current address for four years, and was 32 years old. He stated that his first entry into the United States was in May of 1986, when he entered without inspection at San Ysidro. After entering, he lived in Los Angeles for about 10 or 11 years. He worked first in a junkyard called Fred's Auto Breaking. In 1987 and 1988, he did agricultural work, and then received SAW

status. After getting this legal status in the United States he has made basically annual visits to Mexico to visit family.

Respondent married his wife, Maria Delaluz Lopez, in 1994 in Mexico. They have two children, both born in the United States.

Testimony was taken regarding respondent's and his family's activities in the United States. His son, Anthony; has attended school in this country. The respondent lived in San Diego at one point. Except for the time that he was in jail on his criminal charge, he has been employed. He now owns a grocery store, and had operated a taco stand. Respondent's wife works in his business. Respondent's wife has no legal status in the United States nor does she have employment authorization.

Respondent himself has never received welfare in the United States. His children received Medicaid for two years, but no cash assistance.

Respondent was incarcerated on his criminal charge in 1997. Testimony was taken regarding tax returns in this country. Respondent filed as a head of household because his wife didn't have a Social Security number. There appeared to be significant underpayments in taxes.

Respondent has been arrested in the United States one time. This was in 1985 in Huron, South Dakota. The respondent ultimately was convicted of aiding and abetting the possession of cocaine. The individual he assisted was known as Juan Valdez. Respondent pled guilty to the charge. The police searched respondent's home prior to his arrest and found some money that this Juan Valdez had paid the respondent. Valdez told the police that respondent had given Valdez the cocaine. Respondent denies that. Respondent does acknowledge that he referred Valdez to someone who did sell drugs. Respondent knew where you could get drugs in Huron at that time. The respondent denies any other involvement

in drug dealing. As a result of his conviction, he was sentenced to five years incarceration, and served 15 months. His parole had ended shortly before his testimony. It was noted that Juan Valdez had gotten out of prison more quickly than the respondent.

The respondent denies any drug or alcohol problems. He owns the trailer home where he lives. He had filed a visa petition for his wife in the year 2001 and it was approved.

On cross-examination, respondent stated that he attended school in Mexico, completing his education there at the age of 15. He worked for about six or seven months after that in the family jewelry store. He again testified that he entered the United States on May 10th, 1986, which he described as Mexican Mother's Day. This was before his 17th birthday. Regarding his application for SAW status, one of his uncles helped him with the application. He tacitly admitted that he may not have been eligible for SAW status in his initial testimony. The respondent's wife entered the United States August 28th, 1994. She came legally with a visa.

Additional testimony was taken from the respondent today. He first stated that he had made a mistake in saying he entered the United States in May of 1986. He now amended his testimony to say that he entered in December 1985. He states he was 15 or 16 years old when he entered. His first job in the United States was not at the auto wrecking place. Rather he worked on two farms, one in Coachella and another in San Jose. He gave some minimal information regarding the owners of the farms. A Chinese person owned the farm in Coachella, and the farm in San Jose was Bianchi and Sons Packing House. He acknowledged that he had done some review of his situation since his last hearing to come up with these new dates.

Additional testimony was taken from the respondent regarding his criminal conviction. He states that he was represented by a public defender, Gary Blue, at that time. The respondent states that he discussed his immigration status with Blue during the course of the proceedings. Respondent stated that at one time he would have been glad to go to Mexico if he could have avoided jail time. This would have involved him giving up his immigration status. Ultimately the respondent pled guilty. He states that Blue told the respondent that he wouldn't lose his immigration status if he pled guilty. Respondent had no knowledge as to whether or not Blue had consulted with an immigration attorney during the course of the case, or how Blue knew that a guilty plea would not affect respondent's immigration status.

On cross-examination respondent stated he was not well-represented by Blue. No discussion took place in front of the court in the criminal case regarding respondent's immigration status. Blue did not speak Spanish, but used a woman from Texas as an interpreter. Respondent described her as not being a good interpreter. He could not recall her name. The respondent states that he talked with Blue about the guilty plea on the day the case was scheduled to go to trial. Respondent stated that at that time, he was more interested in his immigration status than the length of his sentence if he were to plead guilty. Blue never made any mention to the respondent of applying for any waivers from removability.

Respondent has made an attempt to contact Mr. Blue since the last hearing. Respondent's counsel also reported that she had spoken with Blue. According to respondent's counsel, Blue could not recall telling respondent anything about his immigration status. His notes did not provide any assistance, and Blue was not willing to submit an affidavit.

The Court will note the following from the exhibits in this case: Exhibit 2 includes the conviction records for

respondent. Also in that exhibit is a Form 1-213. This reports the respondent entered the United States in 1986 illegally. The judgment and conviction is at page 2. Respondent was convicted of aiding and abetting the possession of a controlled substance. He was sentenced to five years on this conviction. The information on the charge is set out at page 5. This reflects that the controlled substance involved was cocaine, and the other person who was aided and abetted was Juan Valdez. The South Dakota statute on aiding and abetting is at page 9 of the exhibit, which reflects that those convicted of aiding and abetting are treated as principals. The Court would note that the underlying statute of which respondent was convicted, Section 22-42-5 is set out at page 8 of the exhibit, and reflects that the unauthorized possession of a controlled substance is a felony.

Exhibit 7 is respondent's application for cancellation of removal. The Court would simply note that there are supporting documents included which reflect that respondent was doing well on parole. Also see Exhibit 9. Exhibit 13 is the United States statute on aiding and abetting, 18 U.S. Code, Section 2, which was essentially similar to the content of the South Dakota statute.

3. ANALYSIS

Removability on the controlled substance violation charge from the Notice to Appear is not disputed. The remaining charges are disputed.

The Court believes that the aggravated felony charge for conviction of a drug trafficking offense is sustained. The Court will rely on the Board's decision in *Matter of Yanez-Garcia*, 23 I&N Dec. 390 (BIA 2002). That case stands for the proposition that the Board will be following the precedent of the Federal Circuit Courts of Appeal governing the area where the immigration case is heard. This was done for the purpose of determining whether or not a particular controlled substance conviction should be

considered an aggravated felony. This Court sits in the geographic location of the United States 8th Circuit Court of Appeals. The guiding authority in this circuit is the decision in *United States* v. *Briones-Mata*, 116 F.3d 308 (8th Cir. 1997). That case stands for the proposition that a felony controlled substance violation under state law would invoke treatment as a drug trafficking crime. In respondent's most recent brief, Exhibit 15, counsel acknowledges at page 4 that applying the *Yanez* definition to respondent's case would result in the finding of an aggravated felony for commission of a drug trafficking crime. Though the Court agrees with that, the respondent has been convicted of a felony narcotics offense.

The issue more strongly argued by respondent regarding aggravated felony is whether or not the respondent's conviction should be considered as an aggravated felony because the guilty plea was entered in 1997. The Court believes that the citation in *Yanez* to *Molina* v. *INS*, 981 F.2d 14 (1st Cir. 1992), is the best authority on the issue of whether or not the guidance of *Yanez* should be applied to the respondent's situation. The *Molina* case involved application of a prior Board decision, *Matter of Ozkok*, 19 I&N Dec. 546 (BIA 1988), to convictions predating the *Ozkok* decision. The Court believes that in the present case, there is neither actual reliance by the respondent on the state of the law prior to the Board's decision in *Yanez*, nor is there effective reliance in any regard. That lack of reliance by the respondent will be discussed further when I cover his credibility. The Court would note that *Molina* v. *INS* stands for the proposition that retroactive application of agency interpretations developed through adjudication is not automatically unlawful. To the contrary, retroactive application of new principles in adjudicatory proceedings is the rule, not the exception. *See* 981 F.2d. at page 22-23. The Court in *Molina* felt that it was appropriate to apply

the changed Board standards from *Matter of Ozkok* to *Molina*'s pre-*Ozkok* conviction.

The Court would also note that at the time the respondent pled guilty, in July of 1997, the *Briones-Mata* decision of the 8th Circuit had already been published. This decision raised serious issues regarding whether a felony narcotics conviction within the territory of the 8th Circuit would be treated as an aggravated felony. The Court believes there are some strong similarities in this situation to that of the respondent in *Molina* v. *INS*. In effect, the respondent was not in a position where he could comfortably rely on any Board precedent in his favor where the Court of Appeals in his area had come to a significantly different conclusion than the Board did. At a minimum this would certainly limit the extent to which he could actually rely on any prior case law.

The Court believes that the aggravated felony charge in this case is established.

Turning to the other two charges of removability, they essentially relate back to the claim that the respondent was not entitled to SAW status when he was granted that status back in the late 1980's. The Court notes that the burden of proof is on the Service to establish that respondent is removable by evidence that is clear and convincing. *See* Section 240(c)(3)(A) of the Immigration and Nationality Act. The respondent did testify at a prior hearing that his entry into the United States was in May of 1986. He has corrected that testimony today and stated that he entered in late 1985. This is testimony regarding events that took place long ago. The Court realizes at this time that the Service does not have access to the respondent's Special Agricultural Worker file because of confidentiality rules. The respondent has given some more specific testimony today regarding where he worked and the times he worked.

The Court believes it is noteworthy that the respondent apparently has not had access to a FOIA report on his file since the last hearing. Considering that we are talking about events of 16 or more years ago, and the events were subject to prior adjudication by the Service, presumably based on adequate proof at the time, the Court is not eager to remove the respondent's permanent resident status based on what could be a faulty recollection of his date of entry from that long ago. The Court does not believe that the evidence of record at this time meets the clear and convincing standard that is required to sustain the charges of removability set out in Exhibit 14. The Court will not sustain those charges.

The Court will comment briefly on the respondent's credibility regarding the circumstances of his criminal trial. While the Court has given the respondent some latitude regarding testimony about his entry back in 1985, the Court will not grant that same generosity to the respondent regarding his criminal conviction of five years ago. The Court believes that his testimony regarding his discussions with his attorney regarding his immigration status are very vague and very unreliable. The respondent's own testimony is that his attorney did not speak Spanish, and the interpreter for their conversations was not very good. The Court believes it is very instructive that no testimony or affidavits were provided from respondent's criminal attorney regarding the conversations that took place in 1997. The Court does not accept the respondent's testimony that his guilty plea in his criminal case was based on any sort of reliance on statements by his attorney that his immigration status would not be affected. This is patently erroneous information, as the respondent was convicted of a controlled substance violation relating to cocaine, and at a minimum would have been placed in removal proceedings at the time. The Court does not find the respondent's testimony the least bit persuasive regarding any reliance

he had on any alleged statements of his attorney regarding his immigration status.

The Court has found that respondent has been convicted of an aggravated felony. To quality for cancellation of removal for a permanent resident, an applicant must not have been convicted of an aggravated felony. *See* Section 240A(a)(3) of the Immigration Act. Based on the Court's finding that the respondent has been convicted of an aggravated felony, the Court will pretermit and deny the respondent's application for cancellation of removal.

The following orders will be entered in this case:

1. Respondent is found to be removable on the two charges contained in the Notice to Appear.

2. Respondent is not found to be removable on the two charges contained in the Form I-261, Exhibit 14.

3. Respondent's application for cancellation of removal for permanent residents is pretermitted and denied.

4. The respondent is ordered removed from the United States to Mexico.

/s/

JOSEPH R. DIERKES

Immigration Judge